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8 BEFORE THE INSURANCE COMMISSIONER  
9 OF THE STATE OF WASHINGTON

10 In the Matter of the Application regarding  
11 the Conversion and Acquisition of Control  
of Premera Blue Cross and its Affiliates,

Docket No. G02-45  
MOTION FOR  
COMMISSIONER'S REVIEW

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13 **I. RELIEF REQUESTED**

14 The Intervenor Groups seek the Commissioner's review of two of the Special  
15 Master's recommendations contained in the recommended Protective Order dated May 1, 2003.  
16 Specifically, the Intervenor groups seek review of the following provisions:

- 17 • **The limitation that only "one representative of each Intervenor  
18 Group" be allowed access to confidential information.**

19 The Intervenor Groups believe that this limitation fails to recognize that they are  
20 composed of variety of groups and entities that, while agreeing to join as groups, still have some  
21 divergent interests. The attorneys need to consult with each of their clients, and they cannot  
22 assume that a single representative from one client would reflect the views of their other  
23 individual client. As detailed below, this limitation should be modified to ensure ethical and  
effective representation.

- 24 • **Support Staff of Counsel Should Be Included in the Definition of  
25 Parties' Counsel.**

1 The Intervenor Groups wish to clarify that support staff may have access to  
2 confidential material while acting in that capacity.

## 3 4 **II. ARGUMENT**

### 5 **A. Client Access to Confidential Information**

6 The May 1, 2003 Protective Order provides that only “one representative of each  
7 Intervenor Group designated to assist Parties’ Counsel with the preparation of this hearing” be  
8 allowed access to any and all information designated by Premera to be “confidential.”  
9 Protective Order Recommendation, Section 3.(a), at 11. The restriction of access to confidential  
10 information by client representatives – specifically, to a single representative per Intervenor  
11 Group – creates unacceptable ethical conflicts for the attorneys representing the various entities.

12 *First*, the Intervenor Groups are comprised of diverse parties. For example, the  
13 Alaska Intervenor Group contains the University of Alaska, the United Way of Anchorage,  
14 Anchorage Neighborhood Health Center, and one disabled individual, John Garner.<sup>1</sup> Similarly,  
15 the Washington Consumer Intervenor Group consists of eleven separate Intervenor agencies,  
16 each of which represents a largely distinct section of a wide spectrum of constituencies,  
17 including family physicians, community health clinics, low-income consumers, women, the  
18 elderly, persons with disabilities, churches, children, and workers in health care facilities.  
19 While all of the intervenors within a group share some basic overarching significant interests,  
20 each group member is nonetheless a separate intervenor with distinct significant interests

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23 <sup>1</sup> Indeed, the Alaska Intervenor have not yet taken a formal position on whether to oppose the proposed  
24 conversion. It is imaginable that, once substantive information has been made available to the Alaska Intervenor,  
25 some of them may wish to oppose the conversion; some may not; some may even choose to withdraw from the  
26 proceeding. What is unimaginable is how any one of them could make a decision of this magnitude when  
information relevant to that decision has been withheld from them.

1 affected by Premera's proposed conversion that are unique to that intervenor.<sup>2</sup> Moreover, as  
2 additional information is obtained through discovery, the intervenors' interests may well diverge  
3 further, even to the point at which they are at odds with each other. Each intervenor should be  
4 able to review information relevant to his or her own interests that will enable him or her to  
5 make intelligent, informed decisions regarding how best to protect those interests. The  
6 provision for a single client representative per group assumes a perfect identity of interests that  
7 does not exist.

8 *Second*, limiting each Intervenor Group to one non-counsel representative with  
9 whom Confidential information may be shared deprives the constituent intervenors of multi-  
10 party Intervenor Groups from being able to adequately and intelligently represent their  
11 significant interests in the adjudicative proceeding and prohibits their counsel's ability to  
12 represent them competently and ethically.

13 Providing counsel with access to confidential information, while preventing them  
14 from sharing it with their client does little to ameliorate this problem. Under the ethics rules,  
15 counsel are required to share such information with her or his client as is reasonably necessary  
16 to permit the client to make informed decisions regarding the representation. RPC 1.4(b).  
17 Although counsel can make certain tactical choices on behalf of their clients, even this must be  
18 done after they have been able to consult adequately with their clients to determine the means  
19 by which their clients' wishes are to be pursued. RPC 1.2(a). It is impossible to see how they  
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23 <sup>2</sup> As the Commissioner noted in his Fourth Order, the Holding Company Acts make no reference to  
24 Intervenor (much less intervenor groups), but rather convey the right to participate to "any person whose  
25 significant interest is determined by the commissioner to be affected may present evidence, examine and cross-  
26 examine witnesses, and offer oral and written arguments, and in connection therewith may conduct discovery  
proceedings in the same manner as is allowed in the superior court of this state." RCW 48.31B.015(4);  
48.31C.030(4); See also Fourth Order at 6 fn3.

1 or their counsel can adequately protect their significant interests if they are barred access to all  
2 information designated as “Confidential.”

3           Lastly, this limitation may create conflict between individual intervenors within a  
4 single groups. Not all of the Intervenor within a given intervening group are represented by the  
5 same attorney.<sup>3</sup> Under the proposed order, at least one Intervenor in each multi-Intervenor  
6 group would have access to Confidential information, and that Intervenor’s interests may be  
7 adequately served. Counsel for each Intervenor within the group will have a duty to argue to the  
8 other Intervenor within the group that her client alone should have access to confidential  
9 information, and thus be the only Intervenor within the group that can make informed  
10 decisions. Even assuming that the Intervenor Groups survive this debate, the arrangement may  
11 sow further discord as this matter proceeds. Requiring Intervenor within an Intervenor Group  
12 to collaborate together under an arrangement where they know that one of their “partners” has  
13 access to a huge store of information based on which it can advance its individual interests,  
14 while the rest of the group members are kept in the dark could create untenable conflicts, and  
15 ethical problems, within the group.<sup>4</sup>

16           In any event, this restriction is not required to adequately protect Premera’s  
17 interest in safeguarding confidential information because there is no reason to believe that the  
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20       <sup>3</sup> For example, the University of Alaska is represented through its general counsel’s office, by Ardith Lynch.  
21 Alaska Legal Services Corporation (ALSC), the Lead Attorney for the Alaska Intervenor, cannot represent the  
22 University due to various federal regulations governing ALSC’s client eligibility guidelines. Columbia Legal  
23 Services has similar income-based restrictions on whom it may represent, and Washington Protection and  
24 Advocacy System is barred under federal law from representing individuals who are not disabled or groups that are  
25 not disability-related organizations. As the Special Master recognized, contrary to Premera’s arguments, individual  
26 intervenors represented by separate counsel must be permitted access to confidential and attorneys eyes only  
information. The Intervenor request that the Commissioner take one step further and permit representatives of each  
intervenor access to confidential information.

<sup>4</sup> The limitation to one designated client representative may force individual Intervenor within each Intervenor  
group to split apart in order to obtain adequate access to information necessary to represent their significant  
interests in the administrative proceeding.

1 mere existence of additional representatives would somehow result in noncompliance with the  
2 Protective Order. What cannot be disputed is that this restriction prevents counsel for the  
3 Intervenor to fully and adequately represent their clients. Therefore, the Intervenor would  
4 agree to no more than 4 representatives per Intervenor Group, with the exception of the Alaska  
5 intervenor group.<sup>5</sup> Moreover, Premera has not alleged, nor could it, that any of the Intervenor  
6 in the above matter are more likely to disclose information than its opponents in the *WSHA v.*  
7 *Premera* action, where it agreed that four representatives per party could have access to  
8 confidential information. See Protective Order in *Washington State Hospital Association v.*  
9 *Premera Blue Cross*, No. 03-2-16467-4 SEA, at 6, line 19. Each representative will be bound  
10 by the Protective Order, a confidentiality agreement, and a declaration in which (s)he swears to  
11 abide by the protections that have been implemented in this case.

12 In short, Premera's proposed restrictive limitation will effectively prohibit each  
13 Intervenor from protecting his or her significant interests and from participating in the fair and  
14 efficient process described in the Commissioner's Fourth Order. See Fourth Order at 3.

15 **B. Definition of Parties' Counsel Does Not Include Support Staff**

16 The Special Master's list of parties' counsel appears to omit support staff for in-  
17 house counsel and the pro bono counsel at Covington & Burling. See Protective Order,  
18 Section 1 (d) at 4-5. By identifying some law firms and legal services agencies as Party  
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21 <sup>5</sup> The Alaska Intervenor are willing to limit the number of representatives who have access to confidential  
22 information to six: 1 for John Garner; 2 for the United Way of Anchorage; 2 for Anchorage Neighborhood Health  
23 Center; and 1 for the University of Alaska. The Alaska Intervenor require six representatives because (1) John  
24 Garner is a stand-alone individual whose interests are not represented by the other members of the group; (2) the  
25 senior executive officer of the United Way of Anchorage needs to consult with the senior member of the board of  
26 directors on all decisions made in the course of this proceeding; (3) the Executive Director of the Anchorage  
Neighborhood Health Center needs to be able to consult with at least one member of her board of directors on  
decisions to be made in the course of this proceeding; and (4) the University of Alaska is not eligible for Alaska  
Legal Services Corporation's services and is represented by separate counsel.

1 Counsel, the Order implicitly affords access to protected records to the support staff of those  
2 firms. However, individual attorneys are identified as the Party's Counsel representing the  
3 Washington Protection and Advocacy System, and from the firm of Covington and Burling that  
4 represents the Welfare Rights Organizing Coalition. As the Protective Order contains no  
5 separate provision affording informational access to support staff, the individually named  
6 Party's Counsel appear to be barred from receiving the assistance of their support staff  
7 concerning any matter that involves protected information. This is likely an oversight. The  
8 Intervenor, therefore, request that the definition of Parties' Counsel be clarified to either  
9 include paralegal and support staff for all named counsel or the entire firm or agency for each  
10 party's counsel.

11 Dated this 9th day of May, 2003.

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13 Respectfully submitted by:

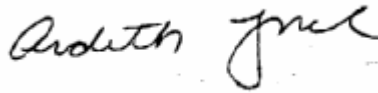
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18 Amy McCullough, Alaska Bar Rule 43 Waiver  
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22 and Anchorage Neighborhood Health Center  
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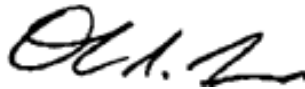


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